Supreme Court, U.S.
FILED
NOV 9 2002
CLERK

No. 01-516

In The

Supreme Court of the United States

PATRICIA W. BUCE,

Petitioner,

v.

ALLIANZ LIFE INSURANCE COMPANY f/k/a NORTH AMERICAN LIFE AND CASUALTY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

DOUGLAS N. CAMPBELL
Counsel of Record
DOUGLAS CAMPBELL & ASSOCIATES, P.C.
4776 East Conway Drive, N.W.
Atlanta, Georgia 30327
404-256-3633
Telecopier 404-256-0423
Counsel for the Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether, as a matter of the federal common law of the construction of ERISA contracts, the Eleventh Circuit properly gave effect to the parties' agreement to look to Georgia law to interpret the Plan's insuring clause and the definition of "injury" applicable to it?

CORPORATE STATEMENT PURSUANT TO RULE 29.6.

Allianz Life Insurance Company of North America is a wholly owned subsidiary of Allianz of America, Inc, a wholly owned subsidiary of Allianz AG, which is publicly traded on the New York Stock Exchange.

TABLE OF CONTENTS

Page

Question Presented i

Corporate Statement Pursuant to Rule 29.6..... ii

Table of Contents..... iii

Table of Authorities iv

Statement of the Case 1

Facts..... 1

The District Court's Decision and the Appeal.. 6

The Petition for Writ of Certiorari 8

Reasons for Not Granting the Writ..... 9

I. Introduction..... 9

The Eleventh Circuit Decision 12

II. The Eleventh Circuit correctly ruled that the Plan's choice of law provision was enforceable in choosing Georgia law to interpret the insuring clause and definitions 16

A. Introduction..... 16

B. There Is No Directly Contrary Authority... 17

1. Decisions of this Court 17

2. There is No Conflict with Decisions of Other Circuits 18

3. Displacement of ERISA Federal Law ... 22

4. ERISA's Goals 22

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Baker v. Provident Life & Acc. Ins. Co., 171 F.3d 939 (4th Cir. 1999) 16

Brewer v. Lincoln Nat. Life Ins. Co., 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991) 20, 21

Brown v. Blue Cross and Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991) 7

Buce v. Allianz Life Ins. Co., 247 F.3d 1133 (11th Cir. 2001) (Buce II) ..... *passim*

Buce v. National Service Industries, Inc., et al., 74 F. Supp.2d 1272 (N.D.Ga. Atl. Div. 1999) (Buce I) 1, 6, 23

Cagle v. Bruner, 112 F.3d 1510 (11th Cir. 1997), *reh. en banc denied*, 124 F.3d 223 (1997) 17

Cates v. Metropolitan Life Ins. Co., 149 F.3d 1182 (6th Cir. 1998) 15

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) 17, 18

Connolly v. Pension Benefit Guarantee Corp., et al., 475 U.S. 211 (1986) 17, 18

Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104 (7th Cir. 1998) 15

Egelhoff v. Egelhoff, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001) 13

TABLE OF AUTHORITIES – Continued

Page

Fowler v. Metropolitan Life Ins. Co., 938 F. Supp. 476 (W.D. Tenn. 1994) 16

Laney v. Continental Ins. Co., 757 F.2d 1190 (11th Cir. 1985) 12

Metropolitan Life Ins. Co. v. Potter, 992 F. Supp. 717 (D.N.J. 1998) 16

Miller v. Auto-Alliance Int'l, Inc., 953 F. Supp. 172, 174-175 (E.D. Mich. 1997)..... 16

Morton v. Smith, 91 F.3d 867 (7th Cir. 1996) .. 18, 19, 21

Mullaney v. Aetna U.S. Healthcare, 103 F. Supp.2d 486 (D.R.I. 2000)..... 15

Nelson v. Sun Life Assurance Co., 962 F. Supp. 1010 (W.D. Mich. 1997) 16

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 22

Prudential Ins. Co. v. Doe, 140 F.3d 785 (8th Cir. 1998), *reh. denied*, 1998 U.S. App. LEXIS 9881 (1998) 14, 18, 20, 21, 22

Schultz v. Metropolitan Life Ins. Co., 994 F. Supp. 1419 (M.D. Fla. 1998)..... 15

Smith v. Life Ins. Co. of North America, 872 F. Supp. 482 (W.D. Tenn. 1994) 16

Sorrells v. Sun Life Assurance Co., 85 F. Supp.2d 1221 (S.D. Ala. 2000) 15

Walker v. Metropolitan Life Ins. Co., 24 F. Supp.2d 775 (E.D. Mich. 1997)..... 16

TABLE OF AUTHORITIES – Continued

Page

Wang Laboratories, Inc. v. Kagan, 990 F.2d 1126 (9th Cir. 1993) 10, 11

Wickman v. Northwestern Nat. Inc. Co., 908 F.2d 1077 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990) 11

STATUTES

29 U.S.C. § 1144(a) 10, 14

TREATISES

Georgia and Tennessee. O.C.G.A. § 40-6-391(a)(5) 4

Tenn. Code Ann. § 55-10-401(a)(2) 4

STATEMENT OF THE CASE

On December 11, 1997, Plaintiff filed suit in the Superior Court of Fulton County, Georgia, to recover "Loss of Life" benefits under an accidental death and dismemberment ["AD&D"] plan [the "Plan"] insured by Allianz Life Insurance Company of North America ["Allianz"], and on January 9, 1998, Defendants removed the case to the United States District Court for the Northern District of Georgia, Atlanta Division. After discovery and motions, the case was tried to the court without a jury on November 8 and 9, 1999, and the district court entered an Order on November 18, 1999, finding that Plaintiff was entitled to recover $150,000 in benefits from Allianz. *Buce v. National Service Industries, Inc., et al*, 74 F. Supp.2d 1272 (N.D.Ga. Atl. Div. 1999) ("Buce I"). Judgment was entered on November 19, 1999, and on December 17, 1999, Allianz filed its Notice of Appeal. On April 10, 2001, the Eleventh Circuit reversed. *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1149 (11th Cir. 2001) ("Buce II"). Mrs. Buce has petitioned this Court for a Writ of Certiorari.

Facts

The relevant facts are those that were before the plan administrator or its representatives at the time of the decision on appeal of the original claim denial. At the time of his death, Plaintiff's husband, Walter Buce, age 57, was covered by a Personal Accident Insurance Plan provided by his employer, National Service Industries, Inc. ["NSI"]. The Plan was originally funded by a Fireman's Fund Insurance Company AD&D policy [the "Policy"] in 1985 and that same year NSI distributed a

summary plan description [the "1985 SPD"] which the Buces received and Mrs. Buce read. In 1993, Allianz became the insurer and issued a new SPD [the "1993 SPD"] which NSI distributed by interoffice mail, a method of distribution which had been demonstrated to be reliable. Mrs. Buce denies seeing it but does not know if her husband ever read or saw it. Each SPD included a copy of the Certificate of Insurance which contained the schedule of benefits and the intoxication exclusion. It is undisputed that the coverage was in effect at the time of Mr. Buce's death and that the Plan is governed by ERISA.

The insuring clause for "Loss of Life" contained in the Certificate provides:

> **LOSS OF LIFE ACCIDENT INDEMNITY**
>
> When injury results in loss of life to the Insured Person . . . , the Company will pay the Loss of Life Accident Indemnity stated in the Schedule of Benefits.

"Injury" is defined in language commonly found in policies of this type:

> "Injury," wherever used in this certificate, means bodily injury caused by an accident . . . and resulting directly and independently of all other causes in loss covered by the policy. . . .

The SPD further provides:

> The [Personal Accident] Plan is to be interpreted in accordance with the laws of the State of Georgia.

In January 1996, Plaintiff made claim to recover the $150,000 "Loss of Life" benefit under the Plan. With her

original claim, Mrs. Buce submitted a claim form, an enrollment card, a certified copy of the death certificate, the Tennessee traffic accident report and a copy of a newspaper article. Ed Carroll, adjuster for American Special Risk Management, which evaluated the claims for Allianz, conducted an investigation which resulted in receipt of an investigation report that included the final police report, an interview with the investigating officer, and a toxicology report. The aggregate of all of the materials so collected formed the basis for the initial coverage decision and revealed the following:

Mr. Buce had a well-known history of drinking. He also had a history of open-heart surgery, was on Lithium and Zoloft and had a heart condition. He had recently been under a great deal of stress due to a late review and the fact that his daughter had been missing for 3½ months and had a very serious drug problem. During the evening of December 12, 1995, the day before his death, he visited his daughter in Acworth, Georgia, and drank about 2½ beers during the evening. He left his daughter's home at around 11:30 p.m. with a bag under his arm and his movements are thereafter unaccounted for until "some time between 12:20 a.m. and 1:00 a.m." when he telephoned his cousin, Sandy Mullin, from "on Ringgold Road" about 45 minutes from his cousin's home in Ooltewah, Tennessee. Sandy told him not to miss the exit to her home and Mr. Buce was in any event very familiar with this area because he traveled it quite frequently. In that conversation, Mr. Buce's tone of voice was short and he stated to Sandy that things were not going right. While traveling north on I-75 inside the city limits of Cleveland, Tennessee, two exits past the exit to Sandy's home, Mr.

Buce's car left the road at approximately 2:00 a.m., hit a guard rail head on, rolled over, and burst into flames. The weather at the time of the wreck was good; there were no witnesses and no other vehicles were involved in the crash; it occurred on a clear, straight, dry four-lane divided, one way, interstate highway with no apparent hazards or traffic controls (lights, signs, etc.); there was no evidence of mechanical failure or apparent defects in vehicle, which was going straight and left no skid marks on the road; no other contributing factors were known.

The toxicology lab report of a blood sample of the decedent taken at 3:35 a.m. on December 13, 1995, and tested on December 22, 1995, showed a blood alcohol content ["BAC"] of .22%, more than twice the level required to be considered intoxicated for purposes of the criminal "driving under the influence of alcohol" statutes in Georgia and Tennessee. O.C.G.A. § 40-6-391(a)(5) (legal limit of .10%); Tenn. Code Ann. § 55-10-401(a)(2) (legal limit of .10%).

Allianz denied the claim on March 12, 1996. By letter dated May 9, 1997, Mrs. Buce's lawyer submitted additional materials, including affidavits, and requested reconsideration. By letter dated July 11, 1997, Allianz's lawyers advised that the claim had been reconsidered and that Allianz stood by its prior denial. Allianz reasoned that, based on Mr. Buce's BAC of .22%, Mr. Buce was intoxicated at the time of the wreck. It said that the Policy provided "accidental means" coverage which means that "in the act which preceded the injury there must have occurred something sudden, unexpected and unforeseen." It went on to state that, as weather and road

conditions appeared to be normal and there was no evidence of vehicle malfunction, it appeared Mr. Buce's injuries were caused by his voluntary ingestion of alcohol and that this therefore did not present a situation involving a "'bodily injury caused by an accident' as required by the coverage provision of the Policy."

Alternatively, Allianz relied upon the following exclusion in the Certificate:

> 20. The Company shall not be liable for any loss sustained in consequence of the person whose injury is the basis of claim being intoxicated. . . .

Adopting a common law definition of intoxication meaning that the person was materially impaired from guarding himself against casualty, Allianz took the position that a person with a .22% BAC is materially impaired within the meaning of that definition and that it appeared this impairment was the cause of the crash that resulted in Mr. Buce's death.

The July 11th letter advised Mrs. Buce of her right to appeal and, on August 29, 1997, her lawyer submitted an appeal accompanied by additional affidavits. Doctor A. C. Richardson opined that Mr. Buce suffered a heart attack that caused him to lose control and crash his car, and that he might well have been dead before the car left the road. A friend, Robert Mello, "opined" that Mr. Buce either fell asleep at the wheel or had a heart attack prior to his car running off I-75 North at about 2:11 a.m. on December 13. None of the additional affidavits disputed the .22% BAC set forth in the toxicology report. The claim not having been paid, Mrs. Buce filed suit on December 11, 1997.

The District Court's Decision and the Appeal

After a two-day bench trial, the district court held that, if Georgia law controlled the interpretation of the Plan, Mrs. Buce could not recover because Allianz's determination that Mr. Buce's voluntary ingestion of alcohol resulting in a .22% BAC while driving removed the crash that caused his injuries from the realm of "accident" under Georgia's "accidental means" doctrine. Buce I, 74 F. Supp.2d at 1276. The district court went on to hold, however, that the Policy's provisions choosing Georgia law as governing the interpretation of the Policy – and specifically the definition of "injury" applicable to the insuring clause for the "Loss of Life" – was essentially preempted by ERISA, thus allowing him to hold that, under federal common law, foreseeability plays no role in determining whether a particular set of facts falls within or without the Policy's definition of "injury." *Id.* at 1279. Without postulating the proper test for making that determination, the court simply held that Allianz was arbitrary and capricious in denying the claim "based upon an interpretation of 'accident' that is not stated in the Policy and that is contrary to the expectations of the ordinary insured." His rationale was just that "[death] as a result of a car wreck is the quintessential accident under the general understanding of that term." *Id.* at 1279. In so holding, he either attempted to distinguish, or else simply ignored, the numerous ERISA "intoxicated driver cases" that reach a contrary conclusion under similar facts (see n.3, *infra*). *Id.* at 1278-79.

On appeal, Allianz reiterated all of the chief positions it had taken in the district court, including:

1. The district court erred as a matter of federal common law in refusing to apply the Plan's choice of law provision which would result in judgment in its favor under a Georgia law interpretation of the Policy terms (as the district court specifically found);

2. Even if federal common law controls the construction of the Policy's insuring clause and definition of "injury," the vast weight of authority and application of the *Wickman* analysis requires the conclusion that Mr. Buce's injuries were not "caused by an accident";

3. There would also be no coverage under Plaintiff's alternate heart attack theory;

4. Because Allianz applied the correct legal rules in making its determination denying coverage, its denial was not "arbitrary and capricious" under, *e.g.*, *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1566 n.12 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991);

5. Even if coverage existed in the first instance, denial was proper under the Policy's intoxication exclusion;

6. The district court erred in holding that Mrs. Buce had relied to her detriment on any omission of the intoxication exclusion from the 1985 SPD.

The Eleventh Circuit reviewing panel reversed, Judge Pollak's majority opinion (in which Judge Barkett concurred), agreeing with position number 1 and strongly indicating in footnote 5, with reference to footnote 4, that Allianz would probably win under position number 2 as

well. Buce II, 247 F.3d at 1145-47, 1149. Judge Barkett's thoughtful concurrence (in which Judge Pollak joined) elaborated at length on her reasons for accepting position number 1. *Id.* at 1149-54. Judge Carnes concurred with the reversal, but preferred not to opine as to position number 1, choosing instead to ground his decision to reverse on positions numbers 5 and 6. *Id.* at 1154-58.

Thus, the three panel judges postulated a total of four separate and independent reasons – all federal law grounds – why Allianz's denial of Mrs. Buce's claims was proper, and the panel did not even reach Allianz's other two positions, each of which would also have justified reversal independently.

The Petition for Writ of Certiorari

In her Petition, Mrs. Buce argues that the Eleventh Circuit panel majority erred in giving effect to the Plan provision that chooses Georgia law to govern the "interpretation" of the Plan. She argues that to do so conflicts with decisions of this Court, of other circuits, and with the federal common law applicable to ERISA. She then argues that to give effect to the parties' agreement to interpret Plan provisions under Georgia law will threaten ERISA's goals of uniformity and protecting plan participants and beneficiaries.

However, Mrs. Buce's Petition is as remarkable for what it does not say as for what it does say. Mainly, she does not even suggest that application of federal common law to avoid the choice of law provision will lead to a different ultimate result in the case. She does not in any way deal with the growing body of ERISA common law

cases that find, in the absence of choice of law provisions, that injuries sustained by insureds with high blood alcohol contents in single vehicle collisions are not "caused by an accident" as discussed by the panel majority in footnotes 4 and 5 of its opinion. See n.3, *infra*. Nor does she address Judge Carnes' independent ground for reversal based upon the intoxication exclusion and Mrs. Buce's lack of detrimental reliance upon the alleged omission from the 1985 SPD of the Certificate's intoxication exclusion, thus authorizing Allianz to deny her claim. And she does not contend that she could successfully overcome Allianz's other attacks upon the district court's judgment even if she could successfully negotiate the first four obstacles. The fact is that, whether federal common law or Georgia law applies to the interpretation of the Plan, Petitioner's claim for benefits must eventually be rejected.

Even were that not so, Petitioner has shown no compelling reason why this Court should review the panel majority's decision regarding the choice of law provision at this time. Their opinions are well reasoned and correct, and the "conflicting" cases upon which Petitioner relies are at best distinguishable or poorly reasoned, and at worst simply inapplicable. Given the paucity of circuit court authority on this point, the issue is certainly not ripe for this Court's consideration.

REASONS FOR NOT GRANTING THE WRIT

I. INTRODUCTION

ERISA's preemption clause does not preempt plan provisions or policy provisions. Instead, it states that

ERISA "supercede(s) any and all State *laws* insofar as they may now or hereafter relate to any employee benefit plan. . . . " 29 U.S.C. § 1144(a) (emphasis added). Thus, when the clause is applied to the analysis of a contract provision, it comes into play at the first point at which the application of "law" is necessary. The Plan and the Policy and Certificate that fund it are nothing but pieces of paper that set forth the agreement of the parties – the Plan Sponsor and the insurer. A contract provision may be attacked for several reasons: *e.g.*, it requires or forbids the doing of something expressly forbidden or required by ERISA; it provides a remedy forbidden by ERISA; or, as here, the provision is ambiguous and in need of "interpretation." It is only to the latter situation that the Plan's choice of law clause is addressed.[1] In construing, or

---

[1] Choice of law provisions frequently cover matters in addition to "interpretation" of contract terms, such as the validity of the contract and its enforcement. Such provisions in ERISA plan documents would obviously raise more troublesome issues, but ones not present in this case. For example, the choice of law clause in *Wang Laboratories, Inc. v. Kagan*, 990 F.2d 1126, 1128 (9th Cir. 1993), was very broad, providing that the " rights and obligations of the parties were to be 'governed by the law of Massachusetts, and all questions pertaining to the validity and construction of such rights and obligations shall be determined in accordance with such law.' " *Wang* did not involve the interpretation of a substantive contract provision stating or chosing a particular limitation period (the court noted that specific contractual periods in insurance contracts are generally enforced, *id.* at 1128), but rather whether the choice of law clause itself overrode the general rule that, in ERISA cases, courts generally "borrow" the contract statute of limitations of the forum state – there California – or whether the clause required resort to the Massachusetts statute of limitations under which the suit was

interpreting, contract provisions, courts apply "canons of construction." In Georgia, for example, many of the canons are memorialized in statutes, whereas others appear in the case law. The federal common law also embraces canons of construction of contracts. *E.g., Wickman v. Northwestern Nat. Ins. Co.*, 908 F.2d 1077, 1084 (1st Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990) ("Federal common law on the issue of insurance benefits . . . must embody common sense canons of contract interpretation.") Construing a choice of law provision in an ERISA plan, the Ninth Circuit in *Wang, supra* n.1, correctly held that the proper rule of interpretation is that "[w]here a choice of law is made by an ERISA contract, it should be followed if not unreasonable or fundamentally unfair." *Id.* at 1128-29. To reasonableness and fairness should obviously be added the qualification that applying the chosen law cannot result in contravening specific provisions or policies of ERISA. If the panel majority was correct in giving effect to the Plan's choice law of provision, everyone, including the Petitioner and the district court, agrees that Allianz properly denied Petitioner's claim. No provision of ERISA directly addresses the meaning of "accident" or "bodily injury caused by an accident," so ERISA's preemption clause does not directly preempt a state law construction of those terms or directly void the choice of law provision insofar as it chooses Georgia law under which to interpret those

---

timely. That is obviously a much closer question, but, again, one not here presented. *See generally* Judge Barkett's comments regarding choice of law provisions in the ERISA statute of limitations issue context. Buce II, 247 F.3d 1153, n.4.

terms. Thus, assuming state canons of construction "relate to" ERISA plans and policies such that ERISA does preempt them, the precise issue is whether, as a matter of the federal common law of the construction of contracts, a court should give effect to the parties' agreement to look to Georgia law to interpret the Plan's insuring clause and the definition of "injury" applicable to it?

The Eleventh Circuit Decision

The panel majority correctly answered that question in the affirmative. In reaching that conclusion the panel first found that the definition of "injury" was "vague," and then found however that it was given clear meaning by the Plan's choice of Georgia law under which to interpret it. Buce II, 247 F.3d at 1147. Under Georgia law, the Policy is clearly an "accidental means" policy, *Laney v. Continental Ins. Co.*, 757 F.2d 1190 (11th Cir. 1985) (construing Georgia law), which requires that the injury be caused by an accident. Buce II, 247 F.3d at 1149-54. A collision brought about by the insured's voluntary ingestion of alcohol in an amount sufficient to induce a .22% BAC would not be an accident under Georgia law, and Allianz survived the Eleventh Circuit's heightened arbitrary and capricious standard of review in so finding and denying the claim. *Id.*

In rejecting Mrs. Buce's attack on the choice of law provision based on ERISA's preemption clause, the panel majority held:

> There is, of course, no question that ERISA's preemptive authority sweeps broadly to preclude the application of provisions of state law

(statutory or decisional) that would undercut the uniform implementation of ERISA's text or its attendant case law. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001). The rationale of ERISA's preemption of otherwise applicable state law mandates is the rationale that underlies all federal preemption – namely, that in enforcing federal law the directives of the supreme federal sovereign take precedence over directives of the not-supreme state sovereign. But when private contracting parties formulate a choice-of-law provision that, with a view to defining liability, incorporates state legal doctrines, those doctrines are not emanations of state authority, they are simply a convenient shorthand for what the private contracting parties wish to agree to. The pertinent question to be addressed with respect to such a choice-of-law provision is, therefore, not a question of the possible irreconcilability of directives issuing from two different sovereignties – one federal and one state. *The pertinent question, in short, is not one of "preemption" in the conventional sense of that term. The pertinent question is whether the principles of liability agreed upon by the parties are inconsistent with the language of ERISA or the policies that inform that statute and animate the common law of the statute.*

In the case at bar, we have been pointed to no ERISA statutory language, and no cases formulating the common law of ERISA, which suggest that the agreement of the parties to utilize Georgia doctrine would be subversive of ERISA policy.

Id. at 1148 (footnote omitted) (emphasis added).

The panel found Petitioner's cases distinguishable, *id.* at 1148, n.6, and reversed. In her concurring opinion, Judge Barkett undertook an analysis of 29 U.S.C. § 1144 (a) to see if Georgia's cases construing the Policy's definition of "injury" are preempted by ERISA as "State laws" that "relate to" the Plan. She concluded that

> [w]hen one looks at ERISA's preemption clause in light of Congress' goals for the entire statute, it seems clear that Congress was simply ensuring that no state regulation would supersede the protections provided by the statute's provisions. Therefore, consistent with these goals, the phrase "State laws" in § 1144(a) refers to the conflicting legislative acts of a state (and any court interpretation of those legislative acts). There is nothing in the goals and purposes of ERISA that extends to non-conflicting agreements to be bound by the decisional law of state courts in interpreting ambiguous terms in their contracts.

Id. at 1152

Noting that this Court has not "addressed ERISA preemption in light of private agreements concerning state law," she distinguished this Court's previous ERISA preemption cases and those cases relied upon by Petitioner, and rejected the Eighth Circuit's decision in *Prudential Ins. Co. v. Doe*, 140 F.3d 785, 790-91 (8th Cir. 1998), *reh. denied*, 1998 U.S. App. LEXIS 9881 (1998), as being unsupported by explanation or analysis.[2] Buce II, 247 F.3d at 1153-54.

---

[2] In any event, the Eighth Circuit's application of the Illinois *contra preferendum* rule in Prudential would have been (1) unnecessary in view of the court's holding that the policy's

If this issue is eventually to be decided by this Court, it is certainly not ripe for consideration at this time and needs to percolate some more. Nor is this an appropriate case in which to decide the issue because, even in the unlikely event Petitioner should prevail on it, the availability of so many alternate theories under which Allianz's claim denial will be upheld would result in a decision on the issue that would have no effect on the ultimate outcome of the case.[3]

---

thirty (30) day limitation was unambiguous, and (2) inappropriate if the district court's review of the claim denial was under the arbitrary and capricious, as opposed to the *de novo* standard, which the Eighth Circuit declined to decide, so the entire discussion of the choice of law clause is a *dictum*.

[3] For example, there is now a substantial body of cases construing similar provisions under federal common law and affirming claim denials in the drunk driving context. *E.g., Cozzie v. Metropolitan Life Ins. Co.*, 140 F.3d 1104, 1110 (7th Cir. 1998) (affirming summary judgment in favor of administrator where insured killed in single vehicle collision while driving with BAC of .252%); *Cates v. Metropolitan Life Ins. Co.*, 149 F.3d 1182 (6th Cir. 1998) (unpublished opinion – affirming summary judgment in favor of insurer where insured killed in single vehicle collision while driving with BAC of .18%); *Sorrells v. Sun Life Assurance Co.*, 85 F. Supp.2d 1221 (S.D. Ala. 2000) (Same- BAC of .22%); *Strickland v. Aetna Life Ins. Co.*, Case No. 3:99cv7244 (N.D.Ohio W.Div. February 3, 2000) (denial of claim proper where insured driver with .22% BAC level died of injuries suffered in single vehicle crash); *Mullaney v. Aetna U.S. Healthcare*, 103 F. Supp.2d 486 (D.R.I. 2000) (Same- BAC .37%); *Wineinger v. Metropolitan Life Ins. Co.*, 98-459-C-Y\G, 1999 U.S. Dist. LEXIS 19873 (S.D. Ind. Oct. 15, 1999) (summary judgment granted to insurer on accidental death claim where insured's BAC was .17% and there was no apparent cause for the crash other than his intoxication, on the ground that the result was foreseeable); *Schultz v. Metropolitan Life Ins. Co.*, 994 F. Supp.

II.

THE ELEVENTH CIRCUIT CORRECTLY RULED THAT THE PLAN'S CHOICE OF LAW PROVISION WAS ENFORCEABLE IN CHOOSING GEORGIA LAW TO INTERPRET THE INSURING CLAUSE AND DEFINITIONS.

A. Introduction

In her Brief of Appellee in the Eleventh Circuit, pp. 30-31, Petitioner devoted a little more than one page of her forty-three (43) page brief to the proposition that "Georgia law does not govern an ERISA case." In her Petition, she now argues for the first time that to give effect to the parties' choice of Georgia law for the

---

1419 (M.D. Fla. 1998) (summary judgment granted to insurer where insured killed in single vehicle collision while driving with BAC of .29%); *Walker v. Metropolitan Life Ins. Co.*, 24 F. Supp.2d 775 (E.D. Mich. 1997) (AD&D benefits properly denied where insured died in single-car collision with BAC of .22%); *Bailey v. Metropolitan Life Ins. Co.*, 1997 U.S. Dist. LEXIS 19480 (M.D.N.C. 1997) (claim properly denied where insured driver of truck had BAC of .25%); *Nelson v. Sun Life Assurance Co.*, 962 F. Supp. 1010, 1013 (W.D. Mich. 1997) (benefits denied where insured died in single-car collision with BAC of .18%); *Miller v. Auto-Alliance Int'l, Inc.*, 953 F. Supp. 172, 174-175 (E.D. Mich. 1997) (fatal crash involving person driving while intoxicated - BAC .29% - not "accidental"); *Fowler v. Metropolitan Life Ins. Co.*, 938 F. Supp. 476, 480 (W.D. Tenn. 1994) ("it is clearly foreseeable that driving while intoxicated [BAC .25%] may result in death or bodily harm"); *Smith v. Life Ins. Co. of North America*, 872 F. Supp. 482 (W.D. Tenn. 1994) (no coverage where alcohol [BAC .23%] at least a partial cause of automobile collision). *See also Baker v. Provident Life & Acc. Ins. Co.*, 171 F.3d 939 (4th Cir. 1999) (BAC .286%). *But see Metropolitan Life Ins Co. v. Potter*, 992 F. Supp. 717 (D.N.J. 1998) (summary judgment denied despite BAC of .314%).

"interpretation" of the Plan runs afoul of previously uncited[4] decisions of this Court, of the Eleventh and other Circuits, and of ERISA's goals. Her arguments fail on all of those fronts.

B. There Is No Directly Contrary Authority

1. Decisions of this Court

Petitioner first argues that the panel majority's decision "contravenes this Court's holdings that ERISA plan fiduciaries **cannot** 'contract out' of ERISA-based law," citing this Court's decisions in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and *Connolly v. Pension Benefit Guarantee Corp., et al.*, 475 U.S. 211 (1986). But neither of those cases involved the enforceability of a choice of law provision governing the "interpretation" of plan provisions. Instead, both involved attacks on plan provisions that limited the liability of employers in a multi-employer pension plan to the contributions they made to the plan on behalf of their participating employees. The problem was that 1980 amendments to ERISA known as MPPAA added "withdrawal liability" provisions imposing additional liabilities on employers which withdrew from such plans. There were no problems with the "interpretation" of the plan provisions limiting liability, which were crystal clear. Instead, the issue was whether those provisions could be *enforced* in the face of MPPAA's requirements to

---

[4] Except for *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir. 1997), *reh. en banc denied*, 124 F.3d 223 (1997), which is so obviously inapposite that the panel majority did not even mention it.

the contrary. The answer was that they could not if MPPAA is constitutional, and this Court held it is. The Court's rationale was simply that private parties cannot contract out of doing that which Congress commands, a proposition that surely requires no lengthy defense in view of the Constitution's Supremacy Clause. *Concrete Pipe*, 508 U.S. at 642-643; *Connolly*, 475 U.S. at 223-224. Those two cases are clearly distinguishable from the instant situation, which only involves an agreement as to how the Plan's ambiguous provisions are to be interpreted.

2. There is No Conflict with Decisions of Other Circuits.

Apparently attempting to create a conflict among the circuit courts on the issue of the effectiveness of choice of law provisions in ERISA plans, Petitioners next cite *Morton v. Smith*, 91 F.3d 867, 871 (7th Cir. 1996), and *Prudential Ins. Co. v. John Doe*, 140 F.3d 785, 790-791 (8th Cir. 1998), as cases where the Seventh and Eighth Circuits have "rejected the argument that plan fiduciaries may assert 'choice of law' provisions to replace the federal common law that governs ERISA with a state's common law doctrines." But any mention of the effectiveness of a choice of law provision in an ERISA benefit plan is *dictum* in both cases.

At issue in *Morton* was the construction of the "self-inflicted injury" exclusion in a health care ERISA welfare benefit plan which had resulted in denial of benefits to Morton for injuries he suffered when he jumped from the roof of a bar while "drunk." The trustees rejected his

appeal and he sued and lost. On appeal, he tried to persuade the court to apply the Illinois *contra preferendum* rule of contract interpretation[5] to the benefit plan based on an Illinois choice of law provision contained in the Plan trust instrument. The Seventh Circuit rejected that argument on the basis that the choice of law provision in the trust instrument expressly applied only to "this Instrument" and was not applicable to the health care benefit plan, which was contained in a different document. *Morton*, 91 F.3d at 871. In *dictum*, the court went on to opine that the choice of law provision could not in any event be enforced, stating that "[t]he federal common law of ERISA preempts most state law in regulating the interpretation of benefit plans." *Id.* at 871 (footnote omitted). Moreover, that statement was a double *dictum* because of the rule, to which the court correctly alluded in footnote number 1 on page 871, that where, as there, the district court reviewed the trustees' interpretation of ambiguous plan language for abuse of discretion, the *contra preferendum* rule has no application because on that type of review the inquiry is not, as it would be under *de novo* review, whether the trustee's interpretation of the plan language was legally the only correct interpretation, but simply whether it was one of the reasonable available alternative interpretations. Thus, *Morton* does not directly and unequivocally hold that a choice of law clause in an ERISA benefit plan is ineffective and it does not directly conflict with the panel majority's decision below.

---

[5] The rule that ambiguous provisions in contracts are construed most strongly against the drafter.

Prudential involved the interpretation of an ERISA health benefit plan provision that limited benefits for the hospital inpatient treatment of mental disorders to 30 days. Prudential denied the claim for benefits beyond the 30-day limit and Doe appealed on the basis that his daughter's illness was not a "mental illness" within the meaning of the limitation clause and therefore the limitation should not apply. The district court affirmed Prudential's denial, apparently under the abuse of discretion standard. The Eighth Circuit declined to decide whether the standard of review should have been abuse of discretion or *de novo*, finding that the result would be the same under either standard. *Prudential*, 140 F.3d at 790. Apparently, the Plan contained a clause that chose Illinois law as applicable to the Plan, but the decision does not quote the clause. Doe argued that the clause required application of Illinois' *contra preferendum* rule to the 30-day limitation. The district court had declined to apply Illinois law "to the issue of benefit denial." The Eighth Circuit agreed, citing *Brewer v. Lincoln Nat. Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991), an ERISA case that did *not* involve a choice of law provision. *Brewer* declined to apply the Illinois *contra preferendum* rule because the Eighth Circuit had adopted a different rule for the construction of substantive plan provisions that are ambiguous (in the absence in a choice of law clause): that, under federal common law, plan terms should be interpreted as they would be understood by a layman. *Id.* at 154. The *Prudential* court then stated that "[t]he choice of law provision in the contract does not alter the outcome here, for parties may not contract to choose state law as the governing law of the ERISA-

governed benefit plan." *Prudential*, 140 F.3d at 791. That statement may be correct, but has no application to a choice of law clause that simply chooses state law to "interpret" ambiguous terms, as opposed to "governing" the entire contract, which is a totally different concept. The attempt of the *Prudential* court to use *Brewer* to bootstrap itself into a rationale for rejecting a choice of law provision is unavailing – the two cases are entirely different.

Moreover, the *Prudential* court's refusal to decide whether the district court correctly applied the abuse of discretion standard is significant and potentially outcome determinative in and of itself, and renders the reference to the choice of law issue a *dictum*. As the Seventh Circuit discussed in *Morton*, *see supra*, if the insurer's interpretation of ambiguous plan language is reviewed for abuse of discretion, the *contra preferendum*/"layman's understanding" dispute is irrelevant and the only questions are: (1) what are the available reasonable alternatives for interpreting the contested ambiguous plan language and (2) did the insurer/review panel choose one of them? The dispute would only be applicable in the *de novo* review situation, and the Eighth Circuit declined to hold which standard was involved. It is also *dictum* because of the Court's specific holding that "Prudential's limitation of coverage . . . is unambiguous," *Prudential*, 140 F.3d at 791, with the result that under either state law or federal law no "interpretation" would be required. Both members of the panel majority specifically rejected *Morton* and *Prudential*. Buce II, 247 F.3d at 1149, n.6 & 1154.

Thus, unlike this case, in which the Eleventh Circuit clearly and unambiguously gave effect to a choice of law

clause in an ERISA benefit plan that chose state law for the "interpretation" of ambiguous plan language, *Morton* and *Prudential* at best contain language, not supported by extensive discussion or persuasive rationale, indicating that they would reject such a clause. However, that language is *dictum* in both cases and not sufficient to support review by this Court at this time.

3. Displacement of ERISA Federal Law

In Section III of her Petition, Petitioner argues that "state common law cannot displace ERISA federal law." However, the cases she cites deal largely with beneficiaries seeking remedies or other enforcement measures that directly conflict with specific parts of the ERISA statutory scheme. *E.g., Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987) (ERISA's comprehensive scheme of remedies preempts state law tort claims, punitive damages claims, etc., based upon benefit denials). None of the cases cited deal at all with the effectiveness of a provision choosing state law to "interpret" ambiguous plan terms.

4. ERISA's Goals

Finally, Petitioner argues that "the Eleventh Circuit's decision threatens ERISA's well-established goals" of protection of the interests of employees and uniformity of Plan administration. The truth is, however, that choosing the law of a single state under which to interpret the terms of a particular plan issued by a multi-state

employer actually *promotes* uniformity.[6] District courts in different circuits may adopt different federal common law constructions of similar plan language, and it may take years for the conflict to work its way through the circuit courts and on to this Court to produce a final, single interpretation. But, where, as here, a state already has an extensive body of law construing similar policy language, allowing the parties to the plan to chose that state's law for plan interpretation is simply a "convenient shorthand for what the private contracting parties wish to agree to." Buce II, 247 F.3d at 1148.

The panel majority specifically and correctly rejected the notion that allowing the parties to specify the law of a particular state under which to interpret ambiguous plan provisions contravenes any specific ERISA provision or frustrates its goals and policies. *Id.* at 1148, 1152.

CONCLUSION

The Eleventh Circuit's reversal of the district court's judgment in this case is correct under several different theories. Petitioner's attack on the Plan's choice of law provision would, even if successful, not change that result. There is no question but that the ERISA statute "governs" ERISA welfare benefit plans, or that, to the

[6] Certainly the district court's application of federal common law to the plan definitions in this case did not promote uniformity. Compare Buce I with the numerous contrary decisions cited in footnote 3, *supra*, which the district court refused to follow.

extent a concept is not specifically contained in ERISA, this Court has directed the development of a body of federal common law to fill in the blanks. But the first stage in dealing with a dispute regarding a plan provision is to interpret it, and that is the first occasion for the application of federal common law. Federal common law recognizes standard canons of construction such as giving effect to the intent of the parties, giving words their ordinary meanings, and requiring that the court in the first instance (1) determine whether a provision is ambiguous and (2), if so, "interpret" it – that is, give it a definite meaning (again, using canons of construction).

It is only *after* the court has determined the meaning of the plan provision that the question arises whether the provision contravenes ERISA's specific provisions or frustrates ERISA's policies and goals. At this point in the process, it is no longer an exercise in "interpretation," requiring instead a comparison of the plan provision as already "interpreted" with the ERISA statute. The Eleventh Circuit panel majority's two carefully considered opinions correctly analyzed this issue and reached the correct conclusion. This Court has not addressed the issue and no other circuit has directly held to the contrary, much less given the issue the thoughtful treatment it deserves. If this Court is eventually to address the issue, it should wait to see whether other circuits, after giving the issue the analysis it requires, reach a result contrary to that reached by the Eleventh Circuit.

This Court should not issue a Writ of Certiorari.

Respectfully submitted,

DOUGLAS N. CAMPBELL
Counsel of Record

DOUGLAS CAMPBELL & ASSOCIATES, P.C.
4776 East Conway Drive, N.W.
Atlanta, Georgia 30327
404-256-3633; Telecopier 404-256-0423
dougcampbell@mindspring.com

APPENDIX

O.C.G.A. § 40-6-391 (1999)

§ 40-6-391. Driving under the influence of alcohol, drugs or other intoxicating substances; penalties; publication of notice of conviction for persons convicted for second time; endangering a child

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;

* * *

(5) The person's alcohol concentration is 0.10 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended; or

Tenn. Code Ann. § 55-10-401 (1999)

55-10-401. Driving under the influence of intoxicant, drug or drug producing stimulant prohibited – Alcohol concentration in blood or breath

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or

(2) The alcohol concentration in such person's blood or breath is ten-hundredths of one percent (.10%) or more.

(b) For the purpose of this section, "drug producing stimulating effects on the central nervous system" includes the salts of barbituric acid, also known as malonyl urea, or any compound, derivatives, or mixtures thereof that may be used for producing hypnotic or somnifacient effects, and includes amphetamine, desoxyephedrine or compounds or mixtures thereof, including all derivatives of phenolethylamine or any of the salts thereof, except preparations intended for use in the nose and unfit for internal use.